91-313

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

No. A-846

LARRY DODSON, et. al.,

Petitioners

-vs-

GENERAL MOTORS CORPORATION, et. al.,

Respondents.

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF THE APPEALS
FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Did the decision of the Appellate Court deny the Petitioners (Plaintiffs/ Appellants) equal protection and due process of the law by affirming the approval of the Consent Decree by the Judge of the United States District Court for the Eastern District of Michigan, Southern District; which was in conflict with other circuits on the same matter and when the Consent Decree was neither adequate, fair nor reasonable? See Cox et. al. -vs- American Cast Iron Pipe Company, 784 F.2d 1546 (11th Cir. 1986); Holmes -vs- Continental Can Co., 706 F.2d 1144 (11th Cir. 1983), Hardin -vs- Stynchomb, 691 F.2d 1144 (11th Cir. 1982), quoting Culpepper -vs- Reynolds Metals Co., 421 F.2d 888, 891, (5th Cir. 1970); and the Supreme Court of the United States has not yet decided whether opting out of (b)(2) classes is ever permissible, and the circuit courts of appeals are split on the issue.

II. Did the Court of Appeals for the Sixth Circuit abuse its discretion by dis-allowing documentation at the appellate level which would support Petitioners position that the Consent Decree is inadequate, unfair and unreasonable?

LIST OF ALL PARTIES

Petitioners

1. Larry Dodson
2. Quester Adams
3. Delbert Lawrence
4. Irving Smith

Respondents

5. General Motors Corporation
6. Dennis Hazen Huguley, et. al.
7. All class members who approved the Consent Decree but are too numerous to list

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Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 22, 1991.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, reported as Dennis Hazen Huguley, et. al., (Class Action) / Larry Dodson, et. al., (Objectors-Class Action) -vs- General Motors Corporation, et. al., dated February 22, 1991, as yet unreported, which is the subject of this appeal.

The Opinion Approving Consent Decree and Order Denying Motion for Substitution of Counsel by the United States District Court

Eastern District of Michigan Southern Division dated September 1, 1989, as yet unreported.

The Order Approving Consent Decree by the United States District Court Eastern District of Michigan Southern Division dated September 11, 1989, as yet unreported.

JURISDICTION

The judgment and opinion entered on February 22, 1991 by the Court of Appeals for the Sixth Circuit. No petition for rehearing was filed. Application for extension of time within which to file a petition for a writ of certiorari was filed on or about May 4, 1991. On or about May 9, 1991, Justice Stevens signed an order extending the time to and including July 22, 1991. The jurisdiction of this Court was invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States provides:

Criminal actions - Provisions concerning - Due process of law and just compensation clauses. - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title VII of the Civil Rights Act of 1964, as amended.

Section 703.(a) provides: It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

FEDERAL RULE OF APPELLATE PROCEDURE

Rule 3(c) provides: Appeal as of Right - How Taken

* * *

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 10 provides: Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another

state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

STATEMENT OF THE CASE

This case began with a class action complaint filed on July 15, 1983 by Laras Eason on behalf of himself and all similarly situated Black salaried employees against General Motors Corporation.

After several amendments to the class action, the third and final amendment alleged that defendant, General Motors Corporation, has utilized and continued to utilize, a performance appraisal system which has a racially discriminatory disparate impact upon plaintiffs in their class and which resulted in racially discriminatory disparate treatment of plaintiffs in their class with respect to the employment practices of promotion, demotion, lay-offs, recall, pay and transfer.

The plaintiffs are seeking declaratory and injunctive relief and to make whole those members of the class adversely affected by the policies and practices described in the complaint by providing appropriate back-pay, reimbursement for lost pension, social security, experience, training opportunities and other benefits in an amount to be shown at trial and other affirmative relief, including but not limited to an affirmative action program to eliminate the effects of the discriminatory practices complained of in plaintiff's complaint. To retain jurisdiction over this action; to assure full compliance with the order of the Court and within applicable law and require defendant to file such reports as the Court deem necessary to evaluate such

compliance; and grant plaintiffs and the class they represent, their attorney fees and costs and disbursements and grant such additional relief as the Court deems proper and just.

STATEMENT OF THE FACTS

The plaintiffs brought this action on behalf of themselves and other persons similarly situated pursuant to Rule 23 (a) and (b) 2 of the Federal Rules of Civil Procedure. The plaintiff filed the Petition for Certification of Class Action on or about August 25, 1983. The defendant filed pleadings in opposition to said Petition for Class Certification and motioned the Court for a Summary Judgment.

The district court certified the class pursuant to Fed. R. Civ. P. 23(b)(2) on October 16, 1986, over General Motors' objections. The Court issued an order on October 20, 1986 which stated the following:

> "For the reasons stated in my July 21, 1986 Memorandum Opinion, IT IS ORDERED that plaintiff's motion for class certification be GRANTED, and that defendant's motion for summary judgment be DENIED.
>
> IT IS FURTHER ORDERED that the class consist of all Black employees of General Motors Corporation in Michigan, Indiana and Ohio who were subject between October 8, 1982 and September 25, 1986 to General Motors' appraisal system for salaried employees except those employed in General Motors' Legal Department and those employed in General Motors' Personnel Department who are members of the designated defense team.
>
> IT IS FURTHER ORDERED that a subclass consist of all Black employees of General Motors Corporation in Michigan, Indiana and Ohio who were subject between October 8, 1982 and September 25, 1986 to General Motors' appraisal system for bonus-eligible salaried employees except those employed in General Motors' Legal Department and those employed in General Motors' Personnel Department who are members of the designated defense team, and those who opt out pursuant

to notice, which counsel are instructed to prepare forthwith.

IT IS FURTHER ORDERED that members of the class or subclass employed in General Motors' Personnel Department, other than those designated members of the defense team, be subject to the following rules:

(a) Counsel for General Motors may contact them directly about matters related to this lawsuit, but may not communicate with them concerning their personal employment situation;

(b) Plaintiff's counsel may not communicate with them in the Personnel Department concerning matters directly related to this lawsuit.

The defendant challenged the certification of the class and filed a petition for a writ of mandamus with the United States Court of Appeals for the Sixth Circuit. The petition for mandamus was not granted, but the Court of Appeals ordered an evidentiary hearing. That order was vacated when the Court of Appeals realized that it had not received the brief of plaintiff class before taking action.

The parties then engaged in extensive discovery. Personnel files of 500 randomly selected Black and White salaried employees were furnished to the plaintiff class and, thereafter, computer tapes containing personnel information on all past and present General Motors employees who worked in the tri-state area from 1982-1986 were provided.

Depositions of General Motors officials, concerning the operations of the salaried employee appraisal systems, the training provided to supervisory personnel in connection with these systems were taken and the analysis of the results were also undertaken by the plaintiff class.

During 1988, settlement negotiations were carried on continuously from July through late October. A settlement agreement was reached in principle on October 21, 1988. A proposed consent decree was submitted to the Court on January 29, 1989.

A hearing was held on January 31, 1989, whereas, Dennis James, Esq., and Ronald Robinson, Esq., appeared on behalf of the plaintiffs. Ronald Riasti, Esq., also appeared on behalf of the plaintiffs. Barbara Berish-Brown, Esq., appeared on behalf of the defendant. Whereas the Court stated:

THE COURT: Off the record for a moment. (A brief discussion was held off the record)

THE COURT: We are here today to discuss whether or not this being a 23 B. 2 class, a notice should now be sent to the members of the class giving them an opportunity to opt out so far as their case is concerned. I think that under the case law as I read the rule that is discretionary. And it would seem to me that in this particular case, since the matter is now over five years old, and since we have had numerous hearings on this matter, that the interests of justice would be served by not sending a notice at this stage, to members of the class giving them the right to opt out. I suggest rather an alternative procedure. And that is that I will approve the settlement to all members of the class, and a hearing will be set for purposes of taking objections. And at that time, should there be any tenable objections, we can address those. I don't think we need the opt out provision in order to do that. And if anyone wants now on the record to make any statement about that, you are welcome to do so. But I would like to have your, at least consensus here as to whether or not you agree with me on that approach.

What do you think Mr. James?

MR. JAMES: Dennis James attorney for plaintiffs. Assuming that at the time we encounter such objections, if we do, that the opt out remains an option still with the Court, then I would agree.

THE COURT: Maybe this is a simplistic view of the matter. Do you agree?

MS. BROWN: I agree with your method.

THE COURT: Maybe this is a simplistic view of the matter. I plan to regard Rule 23 as just a remedial rule, a tool by which in a multiple plaintiff case you have got a remedy. I think we can use it flexibly. And let's address problems only if they come up. Let's not anticipate them coming up. I sometimes think that these notices to opt out make for more trouble than they're worth. Okay. What's the next step then. You will send out the notice if there's something that I have to sign.

The Court preliminarily approved the proposed consent decree by order of February 3, 1989. Notice was given to all members of the class that objections to the proposed consent decree were required to be filed by March 31, 1989.

Plaintiff, Larry Dodson, petitioned the Court for extension of time to file specific written objections. Plaintiff class, by their attorneys, LOPATIN, MILLER, FREEDMAN, BLUESTONE, ERLICH, ROSEN & BARTNICK, P.C., and RONALD REOSTI & ASSOCIATES, filed their opposition to the verified petition for extension of time to file specific written objections submitted by named plaintiff Larry Dodson. Defendant also filed a written response in

objection to named plaintiff Larry Dodson's petition for extension of time to file specific written objections.

A hearing was given on or about April 3, 1989. The following appearances were: Dennis James, Esq., Ronald Robinson, Esq., and Ronald Riasti, Esq., appearing on behalf of the plaintiffs. Barbara Berish-Brown, Esq., and Mark Flora, Esq., appearing on behalf of the defendant. Also appearing were Erline Baggett, Esq., and Larry Dodson, Class Member/Plaintiff.

The hearing began in the following manner:

THE COURT: Do I understand correctly in this petition to extend the time for the hearing on the entry of the proposed consent decree, that -- you're Mr. Dodson?

MR. DODSON: Yes, sir.

Now again, this is after the fact because my letter was dated March the 22nd, which indicates that he would have talked to them before this was sent out because he states so in the letter. These two notices which I received this morning, one dated March the 31st, are after the fact. And the very thing that I am being accused of, of doing something without regard of contacting the attorney or the plaintiffs has occurred here.

For the record, as of -- I am sorry I said that already. I really think the question of the extension is the key. The key basically is in the objections. Mr. James told me that I was overreacting to recent job assignment and promotions in the Indianapolis area, when in fact the decree states that GM has the option, if this was approved, to put it in place either in 1989 or 1990, further giving us concerns with regard to the sense of fair play

that was -- has been pointed out to us because there were promotions. There were people put in positions with less seniority. And these were basically positions that we felt would have been open to Black salaried employees, assuming the decree had been passed.

But I cite as additional reason for my position, also letters from the people of Ohio, people from Indiana and also I have mailings from Michigan. Maybe I watch TV too much, but sometimes cases are won at the last minute due to new found evidence.

In this case, two of the plaintiffs and attorney James ask where were these people six years ago. I can't answer that. But the deadline was March the 31st, and the people did respond. On one hand, the decree tells them that we have the opportunity to object if we wish. And on the other hand the attorneys don't encourage that. If the position I am taking is wrong, because I don't know any better, I apologize for not knowing better. But I am not speaking -- I am speaking for the many people that are involved simply because they are Black salaried employees. Those who are suffering goes far beyond the areas covered by the decree. I thank you for your patience in allowing this opportunity to expose those concerns to you.

THE COURT: Your petition says to and including April 30th; is that correct?

MR. DODSON: Yes.

THE COURT: You are petitioning for this extension,

notwithstanding the fact that you are represented by counsel?

MR. DODSON: Yes.

THE COURT: That is a little unusual, but it's certainly something I can understand. What is the reason for the extension, Mr. Dodson?

MR. DODSON: Your Honor, if I may come forward.

THE COURT: Go ahead, Mr. Dodson.

MR. DODSON: My name is Larry Dodson, and I basically request your assistance because I am no attorney. But what I am speaking of is, on behalf of what I feel and also representative of class members from the State of Indiana, and I feel likewise of other class members with regard to this lawsuit. And since you bear with me, allow me to read -- in trying to cover everything in an adequate manner, I feel that I need to read this so I don't miss any details.

THE COURT: You do it the way you feel most comfortable.

MR. DODSON: The reasons for the request for extension, to adequately answer, would require going into a bit more information regarding the reason for taking this position. If the notice I received, petition of denial, has any bearing on your decision to allow an extension, please allow me the opportunity to read this information. I received notice late Friday night that the hearing had been set. If you ask any of the plaintiffs that would testify, they would testify that I was never fully agreeable to the terms of the decree, nor did I sign anything. I felt that it would not be beneficial until we heard any objections which might have come up from you.

Okay. We were pressured for an answer to close this thing out. And at one point we were told that we would be getting back to the class with the terms of the proposed package to avoid counterproductivity of spending a lot of money mailing a decree out only to have someone file an injunction to stop the proceedings. That preliminary notice of discussion with class members never took place. The only time I was told that all ten thousand people had been communicated with was when the final decree capsule was mailed from GM. My bearing to the pressure of the negatives coming from our attorney, and to keep our calls from further causing further division between the plaintiffs, Mr. James, this decree allows for the class members to object. And I felt that at the time the people were going to come forward that they would be, this would be their last chance.

As of March 6th, some still had not received a notice. A good number of people by way of rumor to -- previous, that the notices had been sent out. Blacks thought it had been settled. Some Blacks thought it had been settled. They also felt that it was too late to do anything. And some heard it, and some feared if they objected, they would be disqualified. Along those lines it was really not specific.

In addition, plaintiffs did not address or did not have addresses and names of class members to communicate that information. Plus the people who are afraid of losing their jobs, which I fear could possibly happen to me as well.

Number seven, on March 18th, 1989, the undersigned, along with named plaintiff

James Kennedy, president of the Pro-Minority Action Coalition, appeared in Indianapolis to explain and answer questions with regard to the proposed decree per notice to Larry Dodson on March 9th. I agree that took place. And number eight, given that all the above circumstances 30 days from the filing or from the date of the mailings of February 28th, that is sufficient time for class members of Indiana to decide whether or not to file an objection. And based on that statement there, I feel that there was not a complete 30 days allowed, in that some people received this notice as late as March 6th, some people did not receive it until as late as March 19th. I understand in the Michigan area, some people did not receive it at all. So we do not in fact have that full 30 days to allow people time to object. The letter of petition from Barbara Brown, Mark Flora states, the other named plaintiffs and their attorneys who represent the class in this case are opposed to the petition. And also, in the first letter that I received from attorney James, it also states, this says wherefore, plaintiffs, pray the petition of Larry Dodson be denied as late as March 26th. I talked with Reverend James Kennedy, and also Larry Kitchen, and neither one of those gentlemen were knowledgeable of the petition for denial had been petitioned to you. And them not knowing this, I said I made that call, I also tried to contact Dennis Huguley which I had trouble reaching him. And to further add to that, that even as late as this morning I received copies from attorney Dennis James where Larry Kitchen and also Dennis Huguley had basically signed papers which agreed that they were against this denial.

With reference to Mr. James' petition, item

number one, we regard to the petition. It stated that Larry Dodson agreed -- item number one, that Larry Dodson agreed to submission of the proposed consent decree agreed to submission of the proposed consent decree to the Court with provisions of a 30-day period for filing objections. Response to that, I agreed under extenuating circumstances. I even went back to explain that considering what was explained to me that this may be the best that could be done, knowing in my heart that it was not acceptable for all concerned, I even told the attorneys, plaintiff class members would not go along with this.

Item number two, that Larry Dodson has filed this petition without consultation or consent of the other named plaintiffs and counsel for the plaintiff class. My response to that, I did inform counsel and plaintiff that objections were arising. When I told Reverend Kennedy, he said he wanted it to be over. He was tired. He felt that it should be accepted, but he would not stand in my way. And by "in my way", I mean that if people objected he would not discourage it. When I told Mr. Kitchen, he said he would not play a part in it -- with these hearings until he was convinced otherwise and that he had seen the numbers of people that would indicate there was a change here. But he also said that he would not stand in my way. I was not able to reach Dennis Huguley.

Number three, after the mailing of approximately ten thousand notices, February 28th, only 23 Indiana mailings have been returned undelivered. I was informed by the Black salaried employees, some had not received notices. Also, that a White employee had received a copy of the

decree.

Number four, as indicated in the notice to the class, exhibit 'H' of the decree, a number of counsel for the plaintiff class has provided to class members to call if they have any questions regarding the decree. People from Indiana stated that they had called the office with questions and were not satisfied with the answers. The same was true of some people from the Ohio area. As mentioned earlier, someone who appeared to be a secretary, said that Ms. Fabian was not in and that she could answer the questions.

Number six, the Indiana chapter of Pro-Minority Action Coalition, a client organization supporting this litigation, whose chapter president is Larry Dodson, held its regular meeting to discuss this decree, March the 11th, per statement to the undersigned by Larry Dodson.

The reasons on negatives given by our attorney included lack of participation, lack of finances, a pending bill for some $200,000. The statement that if we went to court we would look to spend another couple hundred thousand dollars if we went to court. And if we were successful, GM would appeal. Something might happen to you, Judge Feikens, plus if I understand correctly, the company tried to basically have your decision overturned. Then we plaintiffs were told that Feikens doesn't award large settlements, and he does not make people rich at the sake of other class members.

Less than a week, we had less than a week to review the preliminary draft to be done by four people in four different cities who do not know or have the expertise to understand

everything written. Just the same as the -- just the same as the class members didn't completely understand. What they were reading, your Honor, I am one of the four people who represent the class. When I do stop, when I do stop representing the class members, the class members of the State of Indiana made their wishes known by objecting. Before much of this took place, I requested a list of the names and addresses to communicate with the class members as a plaintiff representing the class. I sure that their request was within reason. I was told in no uncertain terms, no, that I would not be given that information.

I was also asked what I was going to tell them. I was also asked who was going to finance it. I was asked where were these people the last six years. It's my position that regardless to where they were in the last six years, the Courts allow for them to object if they wish. Even Reverend Kennedy made the statement as we all did, including Mr. James, if there had been more money to cover bills, more demands could have been made and a better package received.

I was also told this wasn't a settlement as much as it was a compromise. Let me say that my first -- not regarding the petition to you for denial for the request of an extension to my surprise came from our attorneys, with a copy and comments going to GM attorney dated March 22, 1989, which I received March 25, 1989. March 29th I received basically the same thing from Barbara Berish-Brown, Mark Flora. Much of the cited items came from the -- came from Mr. James' petition. I expected something like this to happen, but I expected it to come from GM initially.

The Court granted the petitioner, Larry Dodson, an extension to and including April 13, 1989.

On or about June 23, 1989, plaintiff/objectors by counsel, Godfrey J. Dillard, filed a memorandum in opposition to approval of proposed consent decree. Said petition stated that the trial court will abuse its discretion if it approves the proposed consent decree, because it fails to provide for an opt-out provision and taken as a whole is not fair, reasonable nor adequate.

A hearing on objections was noticed for and held on June 26-27, 1989. Plaintiff, Larry Dodson, motioned for substitution of plaintiff's counsel. A hearing was held on Friday, August 11, 1989. The Court issued an Opinion approving Consent Decree and Order Denying Motion for Substitution of Counsel on or about September 1, 1989. In its Opinion, the Court held that the Consent Decree resolves all claims of race discrimination asserted in, or in any way placed in issue by, the third amended complaint. This includes all claims related to any alleged racially discriminatory purpose, adverse impact or effect of the General Motors appraisal system for Black salaried employees in the tri-state area or in any way related to race discrimination in promotions, pay, demotion, transfer, lay-off, recall or other personnel decisions, including alleged retaliation for participation in this suit and from any claim for attorney fees and costs.

The Consent Decree provides the following: A monitoring system which adjusts for imbalances that may occur in the five-year period by providing that as of the monitoring date for each reporting period (a calendar quarter in the five-year term of the decree), the percentage of discretionary salary increases for Black salaried

employees in the tri-state area and the percentage of discretionary salary increases for all other salaried employees in the tri-state area will be calculated for each salary level.

For any level at which the difference in the percentage of discretionary salary increases for Black salaried employees when compared to the percentage for non-Black salaried employees exceeds 2 standard deviations, adjustments to the salaries of Black salaried employees on the level, for that year, will be made to achieve a difference of no more than 1 standard deviation.

The consent decree states how adjustments will be administered in accordance with the salary administration plan in effect for the year in which the differential occurs.

Promotions likewise are monitored for each level by comparing the percentage of actual Black promotions by level in the tri-state area to the percentage of expected Black promotions generated by a computer model. If these promotion goals are not satisfied, then certain catch-up goals will be established.

The decree provides the methodology for monitoring these promotions as well as a procedure for adjustments. Important to the monitoring system is a provision that if, for any two consecutive reporting periods, the tri-state figures show that the percentage of actual Black promotions in a given level differs from the expected percentage of Black promotions by more than 1.5 standard deviations but less than 2 standard deviations, the underlying data for that level for the two periods will be aggregated. If the aggregated data reveal a difference between the percentage of actual and expected Black promotions of more than 2 standard deviations, but less than 3 standard deviations, then the number of promotions of Blacks required

to bring the shortfall within 1.5 standard deviation will be the catch-up number for the next period.

If the aggregated data reveal a difference between the percentage of actual and expected Black promotions of more than 3 standard deviations, then the catch-up goal for the next reporting period will be the number of promotions required to bring the difference within 2 standard deviations.

The decree provides for a detailed, written, annual report to plaintiff's counsel concerning the group monitoring system and methods by which the report can be reviewed and challenged.

With regard to the commitment of General Motors to attain the promotion goals and/or catch-up promotions, insofar as that commitment is subject to the availability of qualified and interested Black candidates for promotion, General Motors may assert a good faith explanation.

The decree contains a detailed method for individual monitoring so as to provide a procedure for any employee who disagrees with his or her group/ranking.

Finally there are miscellaneous provisions with regard to notice, modification, confidentiality, restrictions on future activities of attorneys and experts for the plaintiff class, and provisions regarding construction and enforcement of the decree.

It provides that it shall be effective and binding for a five-year period from the time the decree has finally been affirmed.

As indicated, the heart of this consent decree is the group monitoring system. It provides significant affirmative action relief. The monetary relief is secondary, and any consideration of monetary relief must be balanced with the massive potential relief provided in the

group monitoring system.

The consent decree also provides monetary relief to certain ex-employee class members, including ex-employees involuntarily terminated, a one-time salary adjustment for certain incumbent employee class members, for named plaintiffs, for anecdotal witnesses for former anecdotal witnesses and for potential anecdotal witnesses and for attorney fees and costs. The details of the decree providing monetary relief are discussed below in that portion of the opinion dealing with objections.

Plaintiff class consists of nearly 10,000 Black salaried employees in Michigan, Ohio and Indiana. Approximately 15°~ of the plaintiff class filed objections. May of these objections were identical in form; many employees objected to the decree's requirement of a general release by those employees receiving money benefits and that the monetary relief for the employee class was neither equitable nor adequate. Another group, again in the identical form, objected to the fact that General Motors did not admit to unlawful conduct, that employees involuntarily released could not receive an award, that all incumbent employee class members should be given some monetary compensation, and that the proposed monitoring system is vague. They also claimed that the consent decree would stifle individual claims for relief. Other objectors claimed that the good faith defense permitting General Motors to explain a failure to meet the group monitoring system goals was too vague.

An analysis of the objections indicates that the overwhelming number of complaints claim that monetary relief is insufficient. While the relief provided in the group monitoring system provides major relief to the class, the objectors focus primarily on the lack of adequate

compensation for alleged past discrimination.

Objection was made also that the consent decree fails to provide for an opt-out of individuals who desire not to be bound by the provisions of the consent decree. The court certified this class in accordance with the provisions of the consent decree. The court certified this class in accordance with the provision of Federal Rules of Civil Procedure 23(b)(2) (FRCP 23 (b)(2)). This case reflects a typical FRCP 23(b) (2) class action settlement. Plaintiff class sought correction through affirmative action in the group monitoring plan for an imbalance allegedly caused by reason of discrimination in promotions and salary adjustments. By their negotiations and settlement the parties have agreed that the prerequisites for the certification and maintenance of the class action are clearly satisfied. Common questions of law and fact substantially predominate, and the claims of the named plaintiffs are typical of the claims of the class. The named plaintiffs do fairly and adequately protect the interests of the class, and their current counsel are skilled in the handling of employee discrimination cases. The requirements for certification under FRCP 23(b)(2) are satisfied.

The monitoring system provided for in the consent decree was criticized by the objectors. It is significant that criticisms of the monitoring system were largely conclusory. The court finds that the group monitoring system devised in this consent decree is innovative. The system requires that discretionary salary increases and promotions to Black employees shall not deviate more than 2 standard deviations from those of comparably qualified White employees at each pay level of each year for a five-year monitoring period. Essentially the design is that a computer will generate a White employee model

of success with respect to discretionary pay increases and promotions and then apply that model to the comparable Black employee population to reach an expected number of pay increases and promotions.

Certain objectors pointed out that the monitoring should be on a facility-by-facility basis rather than on a company-wide basis at each employment level. It appears to the court that a company-wide population for each level would more clearly permit discriminatory patterns to emerge.

The objection that the five-year monitoring period is too short is without merit.

The claim is made that 2 standard deviations allow too much leeway in the monitoring plan. It is clear that 2 standard deviations are a widely accepted statistical range applied when considering whether employees have engaged in discrimination. Hazlewood School District -v- U.S., 433 U.S. 299 (1977); Castaneda, Sheriff -v- Partida 430 U.S. 482 (1976).

PROCEEDINGS BELOW

The Consent Decree was approved by Order of the U.S. District Court Eastern District of Michigan, Honorable Judge Feikens on September 14, 1989.

A "Joint Notice of Appeal" was filed by Godfrey J. Dillard Esq., in "Larry Dodson, et. al., -v- General Motors Corporation" on behalf of "Larry Dodson, et. al.".

The objectors make the following arguments: (l) the class of objectors has standing on appeal; (2) the trial court abused its discretion when it failed to allow members of the class to opt-out, after certifying this as a class action pursuant to Fed. R. Civ. P. 23(b)(2)

and (3) the trial court abused its discretion when it approved the consent decree over the objections of 15 percent of the plaintiff class because both the compensation afforded and the monitoring system provided by the consent decree were inadequate.

The appellate court found the Objectors' arguments without merit and, accordingly affirm.

However, the appellate court stated in reference to standing the following:

> "Although defendant argues that the Objectors lack standing to appeal the terms of the consent decree, we choose nonetheless to address the merits of the issues raised by the Objectors. In light of the fact that we find the Objectors' claims wholly without merit, our assumption in favor of standing for the Objectors is without consequence and should not be construed as a decision on the merits on the standing issue."

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's holding that the policy in favor of not allowing class members to opt-out of 23(b)(2) class actions stems from concern that "defendants would not be inclined to settle where the result would likely be a settlement applicable only to class members with questionable claims, with those having stronger claims opting out to pursue their individual claims separately." Kincaide v. General Tire & Rubber Co., 635 F.2d 501, 507 (5th Cir. 1981). Thus, "lawsuits alleging class-wide discrimination are particularly well suited for 23(b)(2) treatment since the common claim is susceptible to a single proof and subject to a single injunctive remedy." Senter v. General Motors Corp., 532 F.2d 511, 525 (6th Cir.), cert. denied, 429 U.S. 870 (1976). Additionally, the Sixth Circuit stated, "in the interests of judicial economy and efficiency," i.e., to avoid needless

duplicative suits, courts should generally certify classes pursuant to 23(b)(2) when the class members are seeking injunctive relief, and correspondingly, now allow class members to opt out. Laskey, 638 F.2d at 956.

The Sixth Circuit's decision in this case is in conflict with the Eleventh Circuit's, in which the Eleventh Circuit stated in Cox et al. -v- American Cast Iron Pipe Company, 784 F.2d 1546 (11th Cir. 1986) the Court held that while an employment discrimination class action might appropriately be certified under (b)(2) as a case in which "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole" nevertheless, if, at the relief stage, there is, in addition to the aforementioned injunctive and declaratory relief, individual monetary awards in which the interest of some class members may be in competition with the interests of others, a opt-out provision is called for.

Appellant's case is quite similar to Holmes -v- Continental Can Co., 706 F.2d 1144 (11th Cir. 1983). In Holmes, certain class members attempted repeatedly to opt-out or more precisely, to avoid becoming part of the class at all. Objectors to this settlement moved in the District Court that opt-out procedures be established for class members dissatisfied with the monetary aspects of the proposed settlement. The district court denied the motion, concluding that the fairness hearing provided the objectors a "means of litigating all of their individual claims, including claims for higher back pay, or for back pay, or any other individual relief." Because many monetary claims in this case are unique to individual class members, we hold

that the right to opt-out of the class, normally accorded only to members of classes certified under Rule 23(b)(3), must be extended to all members of this (b)(2) class.

Civil rights class actions, including those brought pursuant to Title VII, are generally treated under subsection (b)(2) of Rule 23. See Kincaide -vs- General Tire & Rubber Co., 635 F.2d 501 (5th Cir. 1981). The Appellants acknowledge that this case was properly certified as a (b)(2) class action. Subsection (b)(2) contemplates class cases seeking equitable injunctive or declaratory relief, and back pay comes within the ambit of (b)(2) because the "demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion." Johnson -v- Georgia Highway Express, 417 F.2d 1122, 1125 (5th Cir. 1969). See also Pettway -v- American Cast Iron Pipe Co., 494 F.2d 211, 256-57 (5th Cir. 1974) Pettway III., cert. denied, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed2d 74 (1979). This case does not require us to re-examine the Johnson-Pettway characterization of back pay as equitable relief and thus cognizable under subsection (b)(2). The Johnson-Pettway line of cases reflect our conviction that Title VII and the class action rule should be construed so as to further the strong public policy of eradicating all vestigages of racial discrimination in employment. This court and the cases binding on this court have consistently recognized that discrimination in employment is "one of the most deplorable forms of discrimination known to our society, for it deals not just with an individual's sharing in the 'outer benefits' of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies or chooses." Hardin -vs-

Stynchomb, 691 F.2d 1364, 1369 (11th Cir. 1982), quoting Culpepp
-v- Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970).

The United States Supreme Court has not yet decided wheth
opting out of (b)(2) classes is ever permissible, and the circuit cour
of appeals are split on the issue.

In Penson -v- Terminal Transport Co., 634 F.2d 989 (5th Ci
1981), the Fifth Circuit held that "although a member of a cla
certified under Rule 23(b)(2) has no absolute right to opt-out of th
class, a district court may mandate such a right pursuant to i
discretionary power under Rule 23." 634 F.2d at 993. This holdi
followed from Pettway III, where the court reasoned that Title V
claimants "dissatisfied with their portion of the (back pay) awa
should be allowed to opt-out in order to prove that they were entitl
to a larger portion."

The Penson and Pettway decisions represent
acknowledgement that the monetary relief stage of a Title VII ca
often "begins to resemble a 23(b)(3) action" and that courts ha
shown increasing "concern with providing the due process of rights
the individual class members." Penson, 634 F.2d at 994. Similar
in Officers for Justice -v- Civil Service Commission, 688 F.2d 61
634-35 (9th Cir. 1982), a Title VII class action certified und
subsection (b)(2), the Ninth Circuit allowed opting out in part becau
"given the breadth and nature of the claims asserted, the cla
allegations in plaintiff's complaint, and the procedures adopted by th
district court, it appears clear that this case was in essence a Ru
23(b)(3) class action." Monetary awards may give rise to conflicts
interests within the class, especially when certain class membe
attempt to resolve their individual claims simultaneously with th

class claims.

It is the contention of the Petitioners (Plaintiffs/Appellants) that the trial court erred or abused its discretion by not giving the class members the right to opt-out in this cause of action and the appellate court in affirming the district court's action continued such error. The Petitioners (Plaintiffs/Appellants) further contends that the lower court erred and abused its discretion by not considering and characterizing this class action as a "hybrid".

The Sixth Circuit stated that:

> "The district court concluded that the thrust of affirmative relief for current employees is the computer monitoring system and the changes in the disparate treatment of Black salaried employees that it will promote."

We agree.

The Sixth Circuit further stated that:

> "The entire purpose of the monitoring system is to draw General Motors' attention to areas in which there is a disparity in the treatment of Blacks as compared to Whites. The plaintiff class' complaint alleged that there were disparities along racial lines in General Motors' performance appraisal system as they related to promotions, demotions, layoffs, etc. The monitoring system addresses precisely these concerns."

The Petitioners and his fellow Objectors disagree with the district court's and the appellate court's evaluation of the monitoring system and state that the monitoring system is neither fair, adequate nor reasonable and it is not innovative. The reason it is not innovative is because a similar monitoring system was in effect during the period of discrimination of the class. The General Motors Corporation had

entered an agreement with the Office of Federal Contracts Compliance Programs of the Employment Standards Administration in the United States Department of Labor (OFCCP) providing for a similar monitoring system known as the National Reporting System for General Motors Corporation as the one that the lower court approved in this cause of action. The Petitioner asks "how can the attorney for the class be able to determine if General Motors Corporation is fulfilling its obligation under the monitoring system as far as promotion and salary increases, and not discriminate against the class members when the Office of Federal Contracts Program (OFCCP) who are trained to be able to detect discrimination was unable to do so while their agreement with General Motors was in effect?"

The Petitioner further states that the monitoring system developed by General Motors Corporation in the Consent Decree should not be approved because it is not reasonable and not in the public interest. The primary concern is the base line established at the 2 standard deviation level. In hiring and promotion cases, the Courts have held that the base line for making statistical comparison has been between the racial composition of the qualified person in the labor market and the person holding at issue jobs. (Hazlewood School District -v- United States, 433 U.S. 299, 307-308 (1977). The Supreme Court held that absent discrimination, the minority utilization should approximate minorities in the communities.

Under the 2 standard deviation system, the minorities utilization will never approximate minorities in the community. The monitoring system under the Consent Decree allows General Motors Corporation to utilize the good faith as a defense when they fail to fulfill their obligations under the monitoring system.

The Petitioner (Plaintiffs/Appellants) further contend that General Motors Corporation has a federal contract presently in effect, as well as during the period of the alleged discrimination with the United States Government exceeding fifty thousand dollars ($50,000.00) a year, which required General Motors to take affirmative action under Executive Order 11246.

Under Executive Order 11246, General Motors is required to develop a written affirmative action compliance program for each of its establishments. An affirmative action program is a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. An acceptable affirmative action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and women, at all levels and in all segments of its work force where deficiencies exist.

Affirmative action programs must contain the following information:

(a) Workforce analysis which is defined as a listing of each job title as appears in applicable collective bargaining agreements or payroll records (not job group) ranked from the lowest paid to the highest paid within each departmental or unit supervision.....

(b) An analysis of all major job groups at the facility, with explanation if minorities or women are currently being underutilized in any one or more job groups ("job groups" herein meaning one or a group of jobs having

similar content, wage rates, and opportunities). "Underutilization" is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their availability. In making the utilization analysis, the contractor shall conduct such analysis separately for minorities and women.

(1) In determining whether minorities are being underutilized in any job group, the contractor will consider at least all of the following factors:

(i) The minority population of the labor area surrounding the facility;

(ii) The size of the minority unemployment force as compared with the total work force in the immediate labor area;

(iii) The percentage of the minority work force as compared with the total work force in the immediate labor area;

(iv) The general availability of minorities having requisite skills in the immediate labor area;

(v) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;

(vi) The availability of promotable and transferable minorities within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the

> contractor is reasonably able to undertake as a means of making all job classes available to minorities.

The goals and timetables developed by the contractor should be attainable in terms of the contractor's analysis of its deficiencies and its entire affirmative action program. Thus, in establishing the size of its goals and the length of its timetables, the contractor should consider the results which could reasonably be expected from its putting forth every good faith to make its overall affirmative action program work.

The Petitioner and Objectors assert that the awards for back pay and salary increases are inadequate. The district court enumerated these awards as follows:

> Of nearly 10,000 class members, approximately 2,800 are ex-employees who will share in a pool of $1.16 million, depending on the number of claims filed.... Fourteen percent of the incumbent employee class whose salaries are furthest below statistical white salaried employees will receive first-year base salary adjustments ranging between $800-1,200. This equals a first year distribution of base salary increases of $1 million to approximately 1,000 incumbent employee class members...

It is the contention of the Petitioner (Plaintiffs/Appellants) that the monetary relief for the employee class was neither equitable nor adequate. It is also the contention of the Plaintiff/Appellant that only a small number of the class members will benefit from the monetary relief. The Petitioner (Plaintiffs/Appellants) also object to the manner that the attorneys for the class distributed the monetary award in the manner that they did. The attorneys for the class took it upon themselves, without the assistance of the named plaintiff, nor other

class members, to assist them in making the distribution to the class members. In the opinion of the lower court approving Consent Decree, the Court stated the heart of this decree is the group monitoring system. It provides significant affirmative action relief, the monetary relief is secondary, and any consideration of monetary relief must be balanced with the massive potential relief-provided in the group monitoring system. The Petitioner (Plaintiffs/Appellants) and his fellow class members totally agree that the Court's assessment concerning future benefits are false. In an article dated November 22, 1989, that appeared in the Wall Street Journal, it was reported that the General Motors Corporation in a renewed effort to streamline its costly bureaucracy in the face of slumping sales and intensifying competition, is looking to cut its U.S. white-collar work force by as much as 25% in the next four to five years. Continuing, the article states, "the details of GM's plans haven't been finalized or even announced formally to company employees. But GM hopes to eliminate about 5,000 white-collar jobs a year, or as many as 25,000 in total, as part of a five-year business plan."

This article certainly supports Petitioner (Plaintiffs/Appellants) position that the Consent Decree offered little or no monetary awards in the future.

The Sixth Circuit's denial of oral arguments and documentation (National Reporting System - NRS) which would support the Petitioner's and Objectors position deny them due process of law and enabled General Motors and the plaintiff's representative at the district court level to benefit. The representatives of the plaintiff at the lower level (district court) should have known and General Motors did know that OFCCP and General Motors had an agreement in effect

during the alleged period of discrimination that is and was similar to the monitoring system that is proposed in the Consent Decree. The representative of the Plaintiff at the district court level should have brought this to the attention of the district court Judge regarding the agreement between General Motors and OFCCP. In failing to do so, the plaintiff suffered and the representative of the plaintiff and General Motors benefited. The lower court also suffered because the Judge of said court thought that the monitoring system introduced and made part of the Consent Decree was innovative.

It is the contention of the Petitioner (Plaintiffs/Appellants) that the oral argument and documents presented at the appellate level should have been allowed in order to give the Objectors a fair and equitable hearing.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit and, at a minimum, this case should be remanded for trial on its merits unless the parties can submit or reach a Consent Decree which is free from the deficiencies alleged by the Objector (Plaintiffs/Appellants).

Respectfully Submitted,

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ATTORNEY FOR THE PETITIONER

APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

LARRY DODSON, et. al.,

Petitioners,

-v-

GENERAL MOTORS CORPORATION, et. al.,

Respondents.

APPENDIX TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS HAZEN HUGULEY, et al.,

Plaintiffs,

v.

Civil Action No.
83-2864
Hon. John Feikens

GENERAL MOTORS CORPORATION,

Defendant.

OPINION APPROVING CONSENT DECREE
AND ORDER DENYING MOTION
FOR SUBSTITUTION OF COUNSEL

This case began with a class action complaint filed in 1983 by Laras Eason on behalf of himself and all similarly situated black salaried employees against General Motors Corporation (General Motors) pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. ˆU 2000(e), et seq. (Title VII), the Civil Rights Act of 1866, 42 U.S.C. ˆU 1981, and the Elliott-Larsen Civil Rights Act, M.C.L.A. ˆU 37.2101, et seq.

Several amendments to the class action complaint were filed, it was amended for the third and final time by present counsel in 1986.

The third amended complaint alleges that the past and then-current General Motors salaried employee appraisal systems discriminated on the basis of race in appraisal ratings and with respect

to promotions, demotions, layoffs, recalls, pay and transfers. The scope of the class was narrowed to black salaried employees in the state of Michigan, Ohio and Indiana.

Previous plaintiff class counsel were replaced by current counsel in April of 1985.[1]

A description of the plaintiff class is requisite. By order of October 16, 1986 a class was certified consisting of all black salaried employees of General Motors in Michigan, Indiana and Ohio who were subject, between October 8, 1982 and September 25. 1986, to the General Motors appraisal systems for salaried employees. Those individuals employed in the General Motors legal and personnel departments designated as members of the General Motors defense team were excluded from this class. In 1987 the class was further limited to exclude black bonus- eligible employees in Michigan, Ohio and Indiana.

Prior to the onset of settlement negotiations, defendant challenged the certification of the class and filed a petition for a writ of mandamus with the United States Court of Appeals for the Sixth Circuit. The petition for mandamus was not granted, but the Court of Appeals ordered an evidentiary hearing. That order was vacated when the Court of Appeals realized that it had not received the brief of plaintiff class before taking action. As a part of wide-ranging settlement negotiations, the composition of the class was agreed to and, by letter of May 19, 1989, the parties requested the Court of

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[1]Previous counsel were discharged by class representatives. Fee problems developed and a hearing and opinion followed. See Huguley, et al. v. General Motors Corporation, No. 84-3865 (E.D. Mich. May 26, 1989).

Appeals to hold the mandamus petition in abeyance pending approval of the consent decree then being fashioned by the parties.

To return to the chronology of the case, the parties then engaged in extensive discovery. Personnel files of 500 randomly selected white and black salaried employees were furnished to the plaintiff class and, thereafter, computer tapes containing personnel information on all past and present General Motors employees who worked in the tri-state area from 1982-1986 were provided.

Extensive discovery, by way of depositions of General Motors officials, concerning the operations of the salaried employee appraisal systems, the training provided to supervisory personnel in connection with these systems, and the analysis performed of the results of the systems was also undertaken by the plaintiff class.

In 1988, settlement negotiations were renewed and carried on continuously from July through late October. Negotiations focused on discretionary salary increases and promotions, the two principal employment practices that plaintiff class alleged were statistically linked to the employee appraisal system. It is this appraisal system which is criticized as being discriminatory on a racial basis as it applies to black salaried employees of General Motors in Michigan, Ohio and Indiana.

A settlement agreement was reached in principle on October 21, 1988. A detailed proposed consent decree (decree) was submitted to the court on January 29, 1989.

In accordance with Rule 23 of the Federal Rules of Civil Procedure, see Williams, et al. v. Vukovich, et al., 720 F.2d 909 (6th Cir. 1983), this court preliminarily approved the proposed consent decree by order of February 3, 1989. Notice was given to all members

of the class that objections to the proposed consent decree were required to be filed by March 31, 1989. On April 7, 1989 an additional order was entered extending the time for filing of objections through April 30, 1989, and a hearing on objections was noticed for and held on June 26-27, 1989.

The consent decree resolves all claims of race discrimination asserted in, or in any way placed in issue by, the third amended complaint. This includes all claims related to any alleged racially discriminatory purpose, adverse impact or effect of the General Motors appraisal system for black salaried employees in the tri-state area or in any way related to race discrimination in promotions, pay, demotion, transfer, layoff, recall or other personnel decisions, including alleged retaliation for participation in this suit and from any claim for attorney fees and costs.

Prospective Relief

Central to the dispute between the parties is the General Motors salaried employee appraisal system. General Motors, on an annual basis, appraises the performance of its salaried employees. There are three steps utilized in the appraisal cycle: performance planning, on-going performance review, and completion by the employee of the appraisal worksheet. An appraising supervisor completes the performance appraisal review, and a discussion with the involved employee results in the final step in the appraisal cycle.

The heart of the settlement is contained in the establishment of a system for monitoring discretionary salary increases and promotions for each of the five reporting periods of the decree for all then-employed, non-bonus eligible black salaried employees in the tri-state area. The complaint of race discrimination in the appraisal

system is met and resolved through this adjustment system of monitoring discretionary salary increases and promotions. The appraisal system itself is left relatively untouched.

While there appears to be no precedent approving the type of computerized monitoring system established by the consent decree, the system adjusts for imbalances that may occur in the five-year period by providing that as of the monitoring date for each reporting period (a calendar quarter in the five-year term of the decree), the percentage of discretionary salary increases for black salaried employees in the tri-state area and the percentage of discretionary salary increases for all other salaried employees in the tri-state area will be calculated for each salary level.

For any level at which the difference in the percentage of discretionary salary increases for black salaried employees when compared to the percentage for non-black salaried employees exceeds 2 standard deviations, adjustments to the salaries of black salaried employees on that level, for that year, will be made to achieve a difference of no more than 1 standard deviation.

The consent decree states how adjustments will be administered in accordance with the salary administration plan in effect for the year in which the differential occurs.

Promotions likewise are monitored for each level by comparing the percentage of actual black promotions by level in the tri- state area to the percentage of expected black promotions generated by a computer model. If these promotion goals are not satisfied, then certain catch-up goals will be established.

The decree provides the methodology for monitoring these promotions as well as a procedure for adjustments. Important to the

monitoring system is a provision that if, for any two consecutive reporting periods, the tri-state figures show that the percentage of actual black promotions in a given level differs from the expected percentage of black promotions by more than 1.5 standard deviations, but less than 2 standard deviations, the underlying data for that level for the two periods will be aggregated. If the aggregated data reveal a difference between the percentage of actual and expected black promotions of more than 2 standard deviations, but less than 3 standard deviations, then the number of promotions of blacks required to bring the shortfall within 1.5 standard deviation will be the catch-up number for the next period.

If the aggregated data reveal a difference between the percentage of actual and expected black promotions of more than 3 standard deviations, then the catch-up goal for the next reporting period will be the number of promotions required to bring the difference within 2 standard deviations.

The decree provides for a detailed, written, annual report to plaintiffs' counsel concerning the group monitoring system and methods by which the report can be reviewed and challenged.

With regard to the commitment of General Motors to attain the promotion goals and/or catch-up promotions, insofar as that commitment is subject to the availability of qualified and interested black candidates for promotion, General Motors may assert a good faith explanation.

The decree contains a detailed method for individual monitoring so as to provide a procedure for any employee who disagrees with his or her grouping/ranking.

Finally there are miscellaneous provisions with regard to

notice, modification, confidentiality, restrictions on future activities of attorneys and experts for the plaintiff class. and provisions regarding construction and enforcement of the decree.

It provides that it shall be effective and binding for a five-year period from the time the decree has been finally affirmed.

Monetary Relief

The consent decree also provides monetary relief to certain ex employee class members, including ex-employees involuntarily terminated, a one-time salary adjustment for certain incumbent employee class members, for named plaintiffs, for anecdotal witnesses, for former anecdotal witnesses and for potential anecdotal witnesses, and for attorney fees and costs. The details of the decree providing monetary relief are discussed below in that portion of the opinion dealing with objections.

Objections to the Proposed Consent Decree

Plaintiff class consists of nearly 10,000 black salaried employees in Michigan, Ohio and Indiana. Approximately 15% of the plaintiff class filed objections. Many of these objections were identical in form, many employees objected to the decree's requirement of a general release by those employees receiving money benefits and that the monetary relief for the employee class was neither equitable nor adequate. Another group, again in identical form, objected to the fact that General Motors did not admit to unlawful conduct, that employees involuntarily released could not receive an award, that all incumbent employee class members should be given some monetary compensation, and that the proposed monitoring system is vague. They also claimed that the consent decree would stifle individual claims for relief. Other objectors claimed that the good faith defense

permitting General Motors to explain a failure to meet the group monitoring system goals was too vague.

An analysis of the objections indicates that the overwhelming number of complaints claim that monetary relief is insufficient. While the relief provided in the group monitoring system provides major relief to the class, the objectors focus primarily on the lack of adequate compensation for alleged past discrimination.

In the hearing on objections, the objectors, by consent.[2] were represented by Godfrey J. Dillard, and leeway was given to him and the objectors to amplify objections filed with the court. This was helpful in that it furthered an understanding of the general written objections, which in many instances were stated in broad form and not precisely described.

As indicated, the heart of this consent decree is the group monitoring system. It provides significant affirmative action relief. The monetary relief is secondary, and any consideration of monetary relief must be balanced with the massive potential relief provided in the group monitoring system.

The court approves the group monitoring system provided for in the decree. General Motors recognizes that plaintiff class claims an imbalance in promotion and salary adjustments because of alleged racial discrimination. This innovative monitoring system addresses that concern. The court notes that this procedure nonetheless also provides for promotion and salary adjustment based upon individual

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[2]Diverse clusters of objectors were either represented by other counsel or by themselves. At the hearing there was general agreement that they would be represented by lead counsel, Godfrey Dillard.

qualifications.

Of nearly 10,000 class members, approximately 2,800 are ex-employees who will share in a pool of $1-1.6 million, depending on the number of claims filed. One written objection stated that ex-employees who had been involuntarily terminated could not share in this pool. That objection has been removed by allowing their participation. Fourteen percent of the incumbent employee class whose salaries are furthest below statistical white salaried employees will receive first-year base salary adjustments ranging between $800-1,200. This equals a first-year distribution of base salary increases of $1 million to approximately 1,000 incumbent employee class members. The court approves of these significant distributions.

In considering the award to incumbent employees, the court notes that the incumbent employees receive a substantial benefit from future affirmative relief, which is the pre-eminent goal of this consent decree.

Regarding ex-employees, their recovery, of course, can only be monetary. Objection was raised that the ex-employee award pool should be fixed and not based upon the number of claim forms received. The consent decree provides that the award pool increases and decreases proportionately to the number of claims received. The court agrees that the amount of money an individual receives as an ex-employee should not depend on the number of claims filed.

The consent decree provides also that an additional group of eighty-eight named potential and anecdotal witnesses and named plaintiffs will receive a one-time distribution of approximately $322,496. As to these named plaintiffs and witnesses receiving significant awards, the court notes there have been no objections

criticizing these awards as too large. Objections, rather, have been made that the awards are too small. Named plaintiffs and witnesses are entitled to more consideration than class members generally because of the onerous burden of litigation that they have borne. I find this to be entirely fair.

Objection was made that class members are unprotected if General Motors continues the practices complained of in the case. However, the relief for individual claimants only releases General Motors for the practices complained of up to the date of approval of the consent decree.

Objection was made also that the consent decree fails to provide for an "opt-out" of individuals who desire not to be bound by the provisions of the consent decree. The court certified this class in accordance with the provision of Federal Rules of Civil Procedure 23(b)(2) (FRCP 23(b)(2)). This case reflects a typical FRCP 23(b)(2) class action settlement. Plaintiff class sought correction through affirmative action in the group monitoring plan for an imbalance[3] allegedly caused by reason of discrimination in promotions and salary adjustments. By their negotiations and settlement the parties have agreed that the prerequisites for the certification and maintenance of the class action are clearly satisfied. Common questions of law and fact substantially predominate, and the claims of the named plaintiffs are typical of the claims of the class. The named plaintiffs do fairly

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[3]The possibility of imbalance is tacitly recognized by General Motors. See Affidavit of Joan G. Haworth (attached as Ex. 4 to Memorandum of Defendant General Motors Corporation In Support of Approval of the Consent Decree (filed June 28, 1989)).

and adequately protect the interests of the class, and their current counsel are skilled in the handling of employee discrimination cases. The requirements for certification under FRCP 23(b)(2) are satisfied.

Further opportunity was afforded at hearing to those individuals who had any claims against General Motors which were the subject of the third amended complaint: they were permitted to present reasons why their cases should not be precluded by approval of the decree. Other than general statements indicating that an opt-out clause should be contained in the consent decree, this was not urged by objectors at the hearing. Objection was made that class members were not protected against retaliation by General Motors for participation in this case. It is clear that the consent decree specifically states that a class member has a right to be protected against such retaliation.

The consent decree likewise protects class members against the release of claims challenging future actions on the part of General Motors.

The nondisclosure provisions also are reasonable. These provisions protect sensitive personnel information because of privacy concerns.

Objection was made that an ex-employee award should not be contingent upon filing a proper claim form. This objection is without merit. The claim form itself is a simple one requiring answers to six questions.

The monitoring system provided for in the consent decree was criticized by the objectors. It is significant that criticisms of the monitoring system were largely conclusory. The court finds that the group monitoring system devised in this consent decree is innovative.

The system requires that discretionary salary increases and promotions to black employees shall not deviate more than 2 standard deviations from those of comparably qualified white employees at each pay level of each year for a five-year monitoring period. Essentially the design is that a computer will generate a white employee model of success with respect to discretionary pay increases and promotions and then apply that model to the comparable black employee population to reach an expected number of pay increases and promotions.

Certain objectors pointed out that the monitoring should be on a facility-by-facility basis rather than on a company-wide basis at each employment level. It appears to the court that a company-wide population for each level would more clearly permit discriminatory patterns to emerge.

The objection that the five-year monitoring period is too short is without merit.

The claim is made that 2 standard deviations allow too much leeway in the monitoring plan. It is clear that 2 standard deviations are a widely accepted statistical range applied when considering whether employers have engaged in discrimination. Hazelwood School District v. U.S., 433 U.S. 299 (1977); Castaneda, Sheriff v. Partida, 430 U.S. 482 (1976).

Both at the objectors' hearing and in a second hearing held on August 11, 1989, in which some of the objectors sought to have current counsel for the plaintiff class removed, it was alleged that plaintiffs' representation is inadequate because, of the named plaintiffs, only Larry Dodson remains a current employee of General Motors. Persons who are employees of a company at the start of a

class action, but who are no longer employees when a consent decree is sought to be approved, do not by reason of their ex-employee status become inadequate class representatives. See Senter v. General Motors, S32 F.2d 511 (6th Cir. 1976), cert. denied 429 U.S. 870 (1976).

In any event, at the hearing, plaintiff class indicated that they would have two current General Motors employees, Darnita Stein of Michigan and Robert Raglin of Ohio, added as named; plaintiffs. General Motors has indicated that it will not object to the addition of these persons as named plaintiffs.

Finally, an objection is made that there is insufficient employee representation on the individual monitoring panels. The independent review panel is to be comprised of five employees -- two appointed by General Motors, two by the employees from a list provided by management outside of the employees' chain of command, and one by the employee. This appears to be a fair arrangement and provides for review in an acceptable manner. As counsel for the plaintiff class have pointed out, it would be remarkable if management surrendered this decisional process to complete employee control.

Attorney Fees and Costs

The consent decree provides that plaintiff counsel shall be paid $457.000 in attorney fees. This covers the period from the onset of plaintiff counsel's activity in the case (April 1985) up to October 21, 1988. For work performed by plaintiffs' counsel after that date, General Motors will pay such fees as the parties may agree at the hourly rates set forth in the consent decree. As to costs, plaintiffs' counsel represented in the Brief In Support Of Plaintiffs' Answer To Plaintiff-Objector's Motion For Substitution of Attorney, filed August

8, 1989, that the firm of Lopatin, Miller, Freedman, Bluestone, Erlich, Rosen & Bartnick (Lopatin, Miller) has advanced over $200.000 in expenses. Plaintiff class reimbursed Lopatin, Miller for $20.000 of this $200.000.

Attorney fees and costs were negotiated by the parties. The court is satisfied that, through the adversary process involved in the negotiation and settlement of this substantial class action, the nature and extent of the legal services provided by plaintiff counsel and the costs expended were carefully considered.

No written objections were filed regarding the amount of fees allotted by the consent decree to plaintiff counsel. This opinion will later discuss a motion filed by objectors for the substitution of objectors' counsel, Godfrey J. Dillard, for Lopatin, Miller. Even though objectors challenged the representation of Lopatin, Miller, no objection was made to the amount of fees to be paid.

Accordingly, the consent decree's provision for the payment of attorney fees and costs is approved.

Conclusion

The court summarizes its findings as follows:

Terms of the consent decree are fair, reasonable, adequate and consistent with the public interest in settling disputes. ("The settlement is consistent with the public interest. '[T]here is an overriding public interest in settling and quieting litigation.'" Van Bronkhorst, et al. v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976). "Voluntary out-of-court settlement of disputes is highly favored in the law." In re "Agent Orange" Product Liability Litigation, 597 F.Supp. 740, 758-59 (E.D.N.Y. 1984), affirmed 818 F.2d 145 (2d Cir. 1987), cert. denied 108 S.Ct. 695 (1988)).

The preferential treatment of the named plaintiffs is fair. Franks v. Kroqer Co., 649 F.2d 1216, 1225-26 (6th Cir. 1981).

The court must also evaluate the adequacy of the decree "by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement. Williams, supra at 922, citing Carson, et al. v. American Brands, Inc. 450 U.S. at 88, n.14 (1981).

Counsel for both plaintiff class and defendant have called attention to the recent decisions of the United States Supreme Court which may impact this litigation if the proposed consent decree is not approved.

While the court should not determine the merits of the controversy or the precise facts underlying the legal position of the litigants presenting the consent decree, the court must evaluate the adequacy of the consent decree "by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement." Carson. supra at 88. It might well be that if this consent decree is not approved, plaintiff class might not be able to establish liability or, alternatively, the relief available might be less than that provided in the proposed consent decree. See Wards Cove Packing Company, Inc., et al. v. Frank Antonio, et al., 57 U.S.L.W. 4583 (June 5, 1989).

The court is satisfied that the resiudicata effects of the settlement on all members of plaintiff class are fair.

Post-Fairness Hearing Developments

When the fairness hearing concluded, the court suggested to counsel for the parties and the objectors that they should engage in further discussion to decide whether the claims of the objectors could

be resolved. These discussions were fruitless and the court was asked to proceed to decision.

On August 3, 1989, named plaintiff Larry Dodson and other objectors to the consent decree, through their counsel Godfrey J. Dillard, moved the court to substitute Dillard for the firm of Lopatin, Miller, Freedman, Bluestone, Erlich, Rosen & Bartnick as plaintiff class counsel. A hearing was held on this motion on August 11, 1989.

Dillard made conclusory allegations concerning the inadequacy of Lopatin, Miller as representatives of plaintiffs' class. Principal objections were that counsel is out of touch with members of the class; that there had been no contact with class members in the previous thirty days: that, according to the Affidavit of named class representative Larry Dodson, "National Vice- President of the Pro-Minority Action Coalition, ... and a principal player in the decision to institute and prosecute the; within action, ... the continued legal representation by the Firm of Lopatin, Miller, et al. is not in the best interest of the class"; that "the present attorneys are in collusion with Defendant's attorneys": and that "the present attorneys have had little or no contact with class members". Affidavit of Larry Dodson, filed August 17, 1989.

Objectors' counsel Dillard requested that an evidentiary hearing be held. To determine the likely content of such an evidentiary hearing, the court requested an offer of proof. In response thereto, Dillard stated that he would prove that in the last thirty days there had been no contact between Lopatin, Miller and objectors; that there are class members who have attempted to raise issues regarding individual cases. However, in response to the court's question, Dillard could offer no witness names. He stated that he believed these people

had attempted to communicate with Lopatin, Miller either by telephone or by writing "several letters." Transcript of August 11, 1989 Evidentiary Hearing at pp. 43-45.

He also stated that his proofs would show that "during the course of the discussions that we had over the few days after the consent decree [alluding to the fairness hearing] ... I was told specifically by Mr. [Dennis] James that there was going to be a settlement that was going to be cut between him and the defendants to the exclusion of me ...." Tr. at 45.

The analysis of the United States Court of Appeals for the Second Circuit in City of Detroit v. Grinnell Corp., 495 F.2d 448, 449, 464 (2d Cir. 1974), quoted with approval in Geier v. Alexander, 801 F.2d 799, 809 (6th Cir. 1986), applies to Dillard's objections:

> In general the position taken by the objectors is that by merely objecting. they are entitled to stop the settlement in its tracks, without demonstrating any factual basis for their objections and to force the parties to expend large amounts of time, money and effort to answer their rhetorical questions, notwithstanding the copious discovery available from years of prior litigation and extensive pre-trial proceedings. To allow the objectors to disrupt the settlement on the basis of nothing more than their unsupported suppositions would completely thwart the settlement process. On their theory no class action would ever be settled, so long as there was at least a single lawyer around who would like to replace counsel for the class and start the case anew. To permit the objectors to manipulate the distribution of the burden of proof to achieve such an end would be to permit too much. Although the parties reaching the settlement have the obligation to support their conclusion to the satisfaction of the District Court, once they have done go, they are not under any recurring obligation to take up their burden again and again ad infinitum unless

> the objectors have made a clear and specific showing that vital material was ignored by the District Court. There is no need for the District Court to hold an additional evidentiary hearing on the propriety of the settlement. Its conclusion appears to have been reached only after a thorough investigation of all relevant facts.

Id.

This statement describes clearly what the objectors and their counsel are attempting to do. Most pertinent is this comment in City of Detroit, supra: "On their theory no class action would ever be settled, so long as there was at least a single lawyer around who would like to replace counsel for the class and start the case anew." Or, again: "[When] the parties reaching the settlement have [met their obligation to support their conclusions to the satisfaction of the district court], once they have done so, they are not under any recurring obligation to take up their burden again and again ad infinitum unless the objectors have made a clear and specific showing that vital material was ignored by the District Court. There is no need for the District Court to hold an additional evidentiary hearing on the propriety of the settlement." Id. at 464.

Accordingly, the motion by named plaintiff Larry Dodson and other objectors for substitution of counsel is DENIED.

An order approving the consent decree may be submitted.

IT IS SO ORDERED.

John Feikens
United States District Judge

Dated: Sept. 1, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS HAZEN HUGULEY,
LARRY KITCHEN, JAMES KENNEDY,
AND LARRY DODSON, for themselves
and all others similarly involved,

Plaintiffs,

-v-

Civil Action
No. 83 CV 2864 DT

GENERAL MOTORS CORPORATION,
a foreign corporation,

Honorable John Feikens

Defendant.
_____/

ORDER APPROVING CONSENT DECREE

At a session of said Court held in the United States Courthouse, Federal Building, Detroit, Michigan on _____

PRESENT: HONORABLE John Feikens
U.S. DISTRICT COURT JUDGE

For the reasons set forth in the Court's Opinion Approving Consent Decree and Order Denying Motion for Substitution of Counsel of September 1, 1989, and in consideration of the entire record;

IT IS HEREBY ORDERED that the proposed Consent Decree submitted to the Court on January 26, 1989 as amended July 31, 1989 is approved.

John Feikens
U.S. DISTRICT COURT JUDGE

APPROVED AS TO FORM:

DENNIS D. JAMES (P15427)
Attorney for Plaintiffs

BARBARA BERISH BROWN
Attorney for Defendant

MARK FLORA (P24832)
Attorney for Defendant

NO. 89 2172

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENNIS HAZEN HUGULEY, et al.,
(Class Action)

Plaintiffs-Appellees,

LARRY DODSON, et al.,
(Objectors-Class Action)

Plaintiffs-Appellants,

v.

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

_____/

Before: GUY and BOGGS, Circuit Judges; and EDWARDS, Senior Circuit Judge.

PER CURIAM. Plaintiffs (objectors) appeal from the district court's approval of a consent decree resolving a suit filed pursuant to Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. S 2000e, et seq., 42 U.S.C. S 1981, and the Elliott- Larsen Civil Rights Act, Mich. Comp. Laws Ann. ˆU 37.2101, et˜. The suit was brought on behalf of black salaried employees of General Motors. The employee class claimed that General Motors' performance appraisal system discriminated against them.

The objectors make the following arguments: (1) the class of objectors has standing on appeal; (2) the trial court abused its

discretion when it failed to allow members of the class to opt out, after certifying this as a class action pursuant to FED. R. CN. P. 23(b)(2); and (3) the trial court abused its discretion when it approved the consent decree over the objections of 15 percent of the plaintiff class, because both the compensation afforded and the monitoring system provided by the consent decree were inadequate. We find the objectors' arguments without merit and, accordingly, affirm.

I. FACTS

The original complaint was filed in 1983 by Laras Eason on behalf of himself and all similarly situated black salaried General Motors employees. Several amendments to the original complaint were filed. The third amended complaint was filed in 1986 and alleged that General Motors' performance appraisal system was discriminatory with respect to promotions, demotions, layoffs, recalls, salary increases, and transfers.

The district court certified the class pursuant to FED. R. CIV. P. 23(b)(2) on October 16, 1986, over General Motors' objections.[1]

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[1]The class was further limited to employees in the states of Michigan, Ohio, and Indiana who were subject to General Motors' performance appraisal system between October 8, 1982, and September 25, 1986. Employees in the legal and personnel departments were excluded. In total, the class consisted of nearly 10,000 current and former employees.

General Motors filed a petition for a writ of mandamus with the circuit challenging the district court's certification of the plaintiff class. Although the petition for mandamus was not granted, the court of appeals ordered an evidentiary hearing. The parties subsequently agreed, as part of their settlement negotiations, to the certified class and petitioned the court of appeals to hold the mandamus petition in abeyance pending approval of a consent decree between the parties.

After extensive discovery and lengthy settlement negotiations, the parties proposed a consent decree to the court on January 29, 1989.[2] The district court preliminarily approved the consent decree on February 3, 1989. The consent decree provides the following: (1) a computerized system will monitor the performance appraisal system and notify General Motors when the employment statistics relating to black employees vary significantly from those of white employees; (2) General Motors, when informed of statistically significant deviations, will make necessary adjustments to offset any discrepancies; (3) monetary relief, which will be provided in the form of one-time payments to former employees who are members of the class, for named plaintiffs and anecdotal witnesses, and attorneys' fees. Permanent salary adjustments for current employees as well as attorneys' fees were also included in the proposed consent decree.

Notice was given to all members of the class that objections to the proposed consent decree were required to be filed by March 31, 1989; this time was subsequently extended through April 7, 1989. A fairness hearing was held on June 26 and 27, 1989. All members of the class were given notice of the hearing.

At the fairness hearing, objectors to the consent decree were given the opportunity to present their arguments as to why the

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[2]Discovery included the following: 1) furnishing 500 randomly selected personnel files of both white and black salaried employees; 2) providing computer tapes containing personnel information on all past and present General Motors employees who worked in the certified geographic area during 1982-1986; and 3) numerous depositions of General Motors officials concerning the operations of the performance appraisal system and training associated with the use of the system.

consent decree should not be approved by the court. The objections presented to the court encompassed the issues raised on appeal and several additional issues. These additional issues included, among sundry minor other issues, allowing the pool for monetary recovery for former employees to be dependent on the number of employees making claims, which the district court agreed was inappropriate, and releasing claims for discrimination by General Motors in the future, which the district conclusion was not part of the decree.

After the fairness hearing, the court gave its final approval to the consent decree because it found the terms to be fair, reasonable, and adequate. While approving the consent decree, the court also denied a motion for substitution of counsel for the plaintiff dass. The motion for substitution d counsel was supposed by those members of the class who were dissatisfied with the settlement. This appeal followed.

II. STANDING

Although defendant argues that the objectors lack standing to appeal the terms of the consent decree, we choose nonetheless to address the merits of the issues raised by the objectors. In light of the fact that we find the objectors' claims wholly without merit, our assumption in favor of standing for the objectors is without consequence and should not be construed as a decision on the merits on the standing issue.

III. INABILITY TO OPT OUT

The objectors argue that they should have been permitted to opt out of the class. There is no absolute right to opt out of FED. R. CN. P. 23(b)(2) class actions, however. Laskey v. United Automobile Workers. 638 F.2d 954, 956 (6th. Cir. 1981); see King v. South Cent.

Bell Tel. & Tel.. 790 F.2d 524, 530 (6th Cir. 1986) (plaintiff "could not opt out because the action did not include that privilege"); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1775 (1986) ("ability of a class member to exclude himself from the judgment will depend on which subdivision [(b)(2) or (b)(3)] is deemed controlling').[3] Even if we were to accept the objectors' argument that we should adopt an abuse of discretion standard as announced in Holmes v. Continental Can Co., 706 F.2d 1144, 1155 (11th Cir. 1983), the trial court in the current case did not abuse its discretion when it failed to provide class members with the ability to opt out.

The policy in favor of not allowing class members to opt out of 23(b)(2) class actions stems from concern that "defendants would not be inclined to settle where the result would likely be a settlement applicable only to class members with questionable claims, with those having stronger claims opting out to pursue their individual claims separately." Kincaide v. General Tire & Rubber Co., 635 F.2d 501, 507 (5th Cir. 1981). Thus, "[l]awsuits alleging class-wide discrimination are particularly well suited for 23(b)(2) treatment since the common claim is susceptible to a single proof and subject to a single injunctive remedy." Senter v. General Motors Corp., 532 F.2d 511, 525 (6th Cir.), cert. denied, 429 U.S. 870 (1976). Additionally, we have said that "[i]n the interests of judicial economy and emciency," i.e., to avoid needless duplicative suits, courts should generally certify classes pursuant to 23(b)(2) when the class members are seeking injunctive relief and, correspondingly, not allow class

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[3]See also Mitchell v. Dutton, No. 87-5574, slip op. at 10-11 (6th Cir. Jan. 3, 1989).

members to opt out. Laskey, 638 F.2d at 956.

Although the consent decree before us awards some monetary relief in the form of back pay and compensation hr time spent in the litigation process, the crux of the settlement involves equitable relief in the form of a monitoring system for the defendant's performance appraisal system. The class members' complaint centered on the discriminatory effects of General Motors' performance appraisal system. The remedy, i.e., General Motors' commitment to respond to any statistically significant differences highlighted by the computer monitoring system, necessarily is a remedy for all employees who were subject to evaluations based on the performance appraisal system. In light of the systemic nature of the problem and the magnitude of the remedy, the incentive for the defendant to enter into a consent decree would have been non- existent if class members had been allowed to opt out of the class. In fact, this is a case where to permit opting out may even have been an abuse of discretion due to the nature of the complaint.

IV. FAIRNESS OF CONSENT DECREE

The objectors also argue that the trial court abused its discretion when it approved the consent decree and held that it was "fair, reasonable, adequate, and consistent with the public interest in settling disputes." (App. at 614).[4]

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[4]Plaintiffs cannot voluntarily decline to pursue a class action once it has been filed. Fed. R. Civ. P. 23(e) specifies:

> (e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be

They argue essentially that the decree Should not have been approved in light of the number of objectors, the disproportionate award to named plaintiffs and anecdotal witnesses, the inadequate awards for back pay and salary adjustments, and the ineffectiveness of the computer monitoring system to change the source of discriminatory practices at General Motors.

It is well established that "[t]he ultimate issue the court must decide at the conclusion of the [fairness] hearing is whether the decree is fair, adequate, and reasonable. The Court has no occasion to determine the merits of the controversy or the factual underpinning of the legal authorities advanced by the parties." Williams v. Vukovich, 720 F.2d 909, 921 (6th Cir. 1983) (citation omitted). The factors a court must consider before approving a consent decree include "the fairness of the decree to those affected, the adequacy of the settlement to the class, and the public interest." Id. With these factors in mind, we will examine the plaintiffs' arguments.

The objectors argue that, because so many members are dissatisfied with the consent decree, the consent decree's unfairness is apparent. Notably, only 15 percent, or 1,500 members, of the class have any objections to the settlement. Assuming the objectors are properly representing the actual number of dissatisfied class members, an assumption that the other class members and defendant adamantly contest, a 15 percent rate of dissatisfaction, standing alone, would not suggest that the court abused its discretion in approving the settlement. See. e.g., Grant v. Bethlehem Steel Corp., 823 F.2d 20 (2d

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given to all members of the class in such manner as the court directs.

Cir. 1987) (settlement approved over objections of 36 percent of class); Reed v. General Motors Core., 703 F.2d 170 (5th Cir. 1983) (settlement approved over objections of 40 percent of class).

The objectors take issue with the one-time distribution of $322,496 to the 88 named plaintiffs and anecdotal witnesses. This award was meant to compensate them for their efforts expended throughout the litigation. This issue is not properly raised on appeal. The district court noted that "there have been no objections criticizing these awards as too large. Objections, rather, have been made that the awards are too small. (App. at 608).

Objectors also assert that the awards for back pay and salary increases are inadequate. The district court enumerated these awards as follows:

> Of nearly 10,000 class members, approximately 2,800 are ex-employees who will share in a pool of $1-1.6 million, depending on the number of claims filed.... Fourteen percent of the incumbent employee class whose salaries are furthest below statistical white salaried employees will receive first-year base salary adjustments ranging between $800-1,200. This equals a first-year distribution of base salary increases of $1 million to approximately 1,000 incumbent employee class members....

(App. at 607). The district court concluded that the thrust of affirmative relief for current employees is the computer monitoring system and the changes in the disparate treatment of black salaried employees that it will promote. We agree.

Finally, we find objectors' argument that the monitoring system fails to ameliorate the cause of discrimination equally without merit. The entire purpose of the monitoring system is to draw General

Motors' attention to areas in which there is a disparity in the treatment of blacks as compared to whites. The plaintiff class' complaint alleged that there were disparities along racial lines in General Motors' performance appraisal system as they related to promotions, demotions, layoffs, etc. The monitoring system addresses precisely these concerns.

AFFIRMED.

Attest:
LEONARD GREEN, Clerk

By Sue Johnson
Deputy Clerk

NATIONAL

REPORTING SYSTEM

for

GENERAL MOTORS CORPORATION

MEMORANDUM OF AGREEMENT

THIS AGREEMENT. made and entered into this 15th day of January, 1985, modifies a previous Agreement dated the 30th day of November 1983, [See Attachment A] between the General Motors Corporation (the "Corporation"), and the Office of Federal Contract Compliance Programs of the Employment Standards Administration in the United States Department of Labor (the "OFCCP"). The Corporation's subsidiaries and joint ventures are not included in this Agreement.

I. BACKGROUND AND PURPOSE OF THE AGREEMENT

The Corporation, subject to Executive Order 11246, represents that to the best of its knowledge it is in compliance with the Executive Order and implementing regulations. The Corporation also has entered into a 1983 Conciliation Agreement with the Equal Employment Opportunity Commission whereby the Corporation has agreed to engage in significant outreach and training programs to help women and minorities in the organization as well as externally. The Corporation represents that it currently has in place affirmative action programs, including internal monitoring procedures, which are in conformance with the requirements of the Executive Order and its implementing regulations and based on a national affirmative action program methodology, Nothing contained in this Agreement is intended to relieve the Corporation of the obligations imposed on it by the Executive Order and its implementing regulations.

OFCCP recognizes that it does not have the resources to do compliance reviews at all government contractors' facilities in a given year. There are over 78,000 facilities, covering in excess of 23 million employees, subject to the written Affirmative Action Program

requirements of the Executive Order.

The National Reporting System ("NRS") will allow OFCCP to have an opportunity to review the overall progress of the Corporation on a nationwide basis by job groups. The parties agree that this approach will enhance the Corporation s ability to aggressively pursue affirmative action to achieve equal employment opportunity. The parties also recognize that during any one year it would be impossible for OFCCP to do compliance reviews of a significant percentage of the Corporation's over 500 facilities and 500,000 employees.

In order to achieve a more effective and more efficient equal employment opportunity program, thereby enhancing equal employment opportunity for qualified minority and female candidates, the parties agree that it is in their best interest for the Corporation to continue an NRS which informs OFCCP of the Corporation's affirmative action progress in relation to the employment and upgrading of minorities and women.

The parties also are establishing a methodology for resolving differences or disagreements, which provides for the selection of establishments for standard compliance reviews.

Nothing in this Agreement limits the right or obligation of OFCCP to enforce the Executive Order requirements against the Corporation's facilities, to complete any compliance reviews under way or noticed as of the date of signing this Agreement, to conduct complaint investigations at any of the facilities or to conduct pre-award reviews insofar as OFCCP is required by law to conduct such reviews.

Further, it is understood and agreed that nothing in this Agreement limits the rights or duties of OFCCP to enforce 38 U.S.C.

2012 and/or 29 U.S.C. 793.

II. THE NATIONAL REPORTING SYSTEM

A. Outline of the system

This Agreement modifies an earlier understanding reached by the parties and dated November 30, 1983. The NRS will provide accurate information regarding the Corporation's employment and upgrading of minorities and women and will identify where corrective action may be necessary. The NRS reports. submitted pursuant to this modified agreement, shall show employment data as described in Section B below, as of t~.e end of each calendar year, beginning with calendar year 1985 and concluding with the report submitted for calendar year 1988 on March 15, 1989. The reports as described below will be submitted to the National Office of OFCCP for calendar years. 1985, 1986. 1987, and 1988 no later than March 15 of each succeeding year. In addition. a half-year report, covering the period January 1 through June 30, 1985, will be provided no later than August 1, 1985. A March 15, 1985 Report for calendar year 1984 will be submitted pursuant to the November 30, 1983 agreement.

The NRS will reflect a profile of affirmative action performance under Executive Order 11246 utilizing consistent points of reference and consistent points of evaluation. The NRS will consist of four reporting levels. each report of an increasing level of specificity. The first report is mandatory and must be submitted by the specified reporting date. The remaining three reports will be submitted depending on the results of prior reports as outlined in Section B herein. Failure to provide a report on time may be cause for unilateral cancellation of this Agreement by OFCCP. The NRS is designed to be easily and quickly analyzed in a cost effective manner by the National

Office of OFCCP.

The Corporation or OFCCP may terminate this Agreement. if the nature of the affirmative action requirement is altered by regulatory change.

B. The NRS Report

Report 1 Will consist of the Corporate Job Group Summary, which will state the total number of incumbents in each corporate-wide job group by race and sex. and will identify corporate job groups where the utilization percentage of minorities or women is less than availability. The job groups developed for the Standardized Affirmative Action Format (SAAF) must be used in the NRS. The corporate-wide availability for each job group shall be an aggregated availability for that particular job group, (i.e.. each establishment's availability figures for each job group will be weighted based on the percentage of incumbents in such job group employed at that establishment). [See Attachment B]. The methodology each establishment uses for computing availability is standardized in the SAAF. Availability will be determined by analyzing internal (i.e., transfers and promotions) and external (i.e., new hires) movement into a job group. For the purpose of determining appropriate feeder pools, the internal and external movement will be weighted in accordance with both past experience and future anticipated placement decisions (e.g.. reorganization; technological change; transfer. change or elimination of function).

No further reporting shall be required for job groups where the utilization of minorities and/or women is within two standard deviations of availability or for clerical job groups where the utilization of women is 50 percent or-greater. This shall not be considered a

utilization analysis.

If the representation of minorities and/or women in a particular job group is not within two standard deviations of availability at the corporate-wide level, then Report 1 shall indicate the actual corporate-wide placement rates as compared to the corporate-wide availability for that job group. A placement is defined as a new hire, transfer or a promotion into the job group during the reporting period. Placement decisions over which the Corporation has no control (e.g., placements as a result of recall, returns from leaves of absence, or new employe placement resulting from mergers and acquisitions) will not be counted as placements.

If the corporate-wide placement rate of minorities and/or women for a given job group falls short of corporate- wide availability for that job group, then Report 2 must be prepared.

Report 2 shall consist of a further analysis by the Corporation's Executive Group [See Attachment C] level of those groups requiring additional reporting as determined by the above methodology. Each job group in Report 2 shall be analyzed by the same two-step procedure as required for Report 1 (i.e., representation analysis; placement analysis, if necessary). Availability for each job group at the Executive Group Level shall be the aggregated weighted averages of each plant or establishment within the specific Executive Group Level.

For job groups in the Executive Group level where incumbency is not within the two standard deviation level from availability and the placement rate is below availability, an additional Report 3 will be required. Report 3 shall consist of a further analysis at the Division level or staff [See Attachment C] of those groups requiring additional

reporting as determined by the above methodology. Report 3 shall be similar in form to Reports 1 and 2.

For job groups within a Division or staff that require additional reporting as determined above, Report 4 shall be prepared. Report 4 shall be similar in form to Reports 1, 2, and 3, and it shall analyze the job groups for each plant or establishment pursuant to the above methodology within that Division or staff.

For job groups at the Report 4 level that are (l) underutilized at the two standard deviation level and (2) have a placement rate less than availability, and (3) have a significant number of transactions within the reporting period (i.e., placements times availability produces one whole person), the Corporation shall meet with OFCCP and offer an explanation of the Corporation's good faith efforts to achieve its goals. and/or the personnel activity at that facility or establishment (e.g., layoffs, voluntary terminations, transfers. circumstances beyond the Corporation's control -- or other non-discriminatory reasons -- which may have prevented the Corporation from meeting its goals). If the explanation is not satisfactory to OFCCP, the Corporation and the OFCCP National Office will attempt in good faith to arrive at a corrective action program that will resolve the identified problem prior to an on site audit.

The selection of an additional facility for an on site review shall be made pursuant to the Equal Employment Data System of OFCCP. These reviews shall be initiated through a Notice of Desk Audit by November 15 of each year. OFCCP will continue to conduct Pre-Award audits pursuant to its present program.

If, after the proper notification, there are ten facilities available to OFCCP for the Pre-Award compliance review and pursuant to NRS reports then this optional review procedure will not be used.

III. COMMITMENTS OF THE PARTIES

1. The Corporation agrees to provide the National Office of OFCCP with the NRS reports as described herein by August 1, 1985, and by March 15, 1986, 1987, 1988 and 1989. Failure to do so in a timely manner may result in unilateral cancellation of this Agreement by OFCCP.

2. Disagreements between the Corporation and OFCCP will be dealt with by discussion and good faith negotiations.

3. OFCCP agrees that to the extent that it selects facilities for review pursuant to this Agreement, OFCCP in monitoring the Corporation's affirmative action obligations, will focus on those job groups that are underutilized and the adequacy of the Corporation's good faith effort.

4. All NRS reports will be considered in the custody of OFCCP and retained. At OFCCP's request, the corporation agrees to meet with OFCCP and verify or clarify, to OFCCP's satisfaction, any condition reported on the NRS. After timely good faith discussion. if the parties are unable to agree as to verification or clarification, either

party may unilaterally cancel the Agreement.

5. Individual charges of discrimination filed with OFCCP pursuant to the Executive Order by the Corporation's employees and applicants for employment, shall be referred to the EEOC consistent with OFCCP's Memorandum of Understanding with the EEOC.

Class or systemic charges filed pursuant to the Executive Order, and all charges filed pursuant to Section 503 of the Rehabilitation Act of 1973 and Section 2012 of the Vietnam Era Veterans' Readjustment Assistance Act, shall be investigated consistent with applicable regulations and procedures; provided, however. that the investigation of any Executive Order complaint shall be limited to the specific charge that was filed. In those instances where a class or systemic charge is non-specific or broadly based, OFCCP's investigation of such issue or issues will be limited to the personnel practices that allegedly arise from disparate treatment or have an adverse impact on minorities and/or women and for which the complainant(s) submit evidence for their allegations which OFCCP believes is sufficient to proceed with an investigation.

If a pattern and practice of disparate treatment by individual supervisors is alleged, or if it is alleged that a personnel practice or policy, neutral on its face, has an adverse impact in a given department because individual supervisors are alleged to be discriminating, then those individual supervisors or managers and their alleged discriminatory practices will be investigated by OFCCP. Investigations will be expanded beyond the department in which individual supervisors are alleged to be discriminating if evidence is uncovered in the investigation of that department that indicates the potential of discriminatory actions in other departments. In either

event, to the extent that there are policies of the Corporation alleged to be discriminatory, those investigations will be conducted by the National Office of OFCCP with assistance £rom its field organization where appropriate.

6. OFCCP agrees that it shall exercise its discretion regarding the NRS data and any subsequent data or material provided at the request of OFCCP, to assert all applicable exemptions under the Freedom of Information Act, 5 U.S.C. 552, or under any other authority in response to any request for such data or material during the life of this Agreement or any extension thereof. OFCCP agrees to provide written notice to the Corporation when data are the subject of a FOIA or any other request before responding thereto, and agrees, further, to provide ten working days written notice to the Corporation of any proposed release of data.

7. NRS, or other reports or data submitted pursuant to this Agreement by any of the Corporation's, facilities is to be used as a resource in making selection decisions and may not, without other evidence, be used to demonstrate a finding by OFCCP of a lack of compliance by any facility with Executive Order 11246 or its implementing regulations.

8. The Corporation's headquarters will be responsible for submitting the NRS reports described in this Agreement to the National Office of OFCCP.

9. After submitting the reports on March 15, 1988, the parties will jointly determine within the following 60 days whether to continue the NRS, modify it in any way or discontinue this Agreement on December 31, 1988. In any event, a report for calendar year 1988 shall be submitted no later than March 15, 1989. However, the

Agreement may be terminated by either party, with written notice, 30 days prior to the end of any calendar year; provided, however, that a report for the final calendar year shall be submitted no later than March 15 of the following year.

10. OFCCP agrees to designate one or more persons to be responsible for receiving and analyzing the NRS reports, and for all follow-up inquiries and discussions with the Corporation. The Corporation will designate a liaison to respond to and cooperate with OFCCP.

11. Either party may propose modification in any of the terms of this Agreement, including any change in reporting, however, the changes must be approved by both parties.

12. If business circumstances change, including but not limited to corporate restructuring, in ways that either party believes will impact the effectiveness, administration or operation of this Agreement, the parties will meet to discuss appropriate modifications to this Agreement as more fully described in Paragraph 11 above.

13. To the extent that a dispute arises based on differing interpretations of this Agreement and the SAAF, this Agreement will control.

14. OFCCP agrees not to share the data acquired pursuant to this Agreement with any governmental agency with which it does not have an agreement to share data.

This modified agreement represents the entire Agreement on the NRS Program between the parties. To the extent this Agreement varies from that dated November 30, 1983, this Agreement will control.

IN WITNESS WHEREOF, the parties hereto have caused this

Agreement to be executed by their respective representatives on the day and year first above written.

GENERAL MOTORS CORPORATION

Witness: _____

By: A. S. Warren, Jr.
Vice President In Charge
of Industrial Relations
Staff

By: Edmond J. Dilworth, Jr.
Assistant General Counsel

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS OF THE
UNITED STATES DEPARTMENT
OF LABOR

Witness: _____

By: Susan R. Meisinger
Deputy Under Secretary for
Employment Standards

ATTACHMENT B

Administrative Staff 6-8

Establishment	Total Incumbents	Minority Availability	Weighted Availability
Delco Products	500 (20%)	10%	2.0%
Electromotive	1,000 (40%)	5%	2.0%
Oldsmobile	750 (30%)	20%	6.0%
Saginaw steering Gear	250 (10%)	12%	1.2%
Corporate Total	2,500		11.2%

*/ Availability is determined at each facility based upon the Corporations' Standardized Affirmative Action Format.

In the above example, weighted availability for the job group at each facility is determined by multiplying facility incumbent percentages of the corporate job group total (column 1) by minority availability percentages (column 2) to arrive at the weighted availability (column 3). The sum of the weighted availabilities for the job group at each facility is the aggregated weighted availability.

ATTACHMENT C

CPC GROUP

Chevrolet
Pontiac

BOC GROUP

Buick
Oldsmobile
Cadillac

ELECTRICAL COMPONENTS GROUP

AC Sparkplug
Delco Electronics
Delco Products
Delco Remy
Packard Electric
Rochester Products

MECHANICAL COMPONENTS GROUP

Fisher Guide
Central Foundry
Delco Marine
Harrison Radiator
Hydra-Matic
Inland
New Departure Hyatt
Saginaw Steering Gear

TRUCK AND BUS GROUP

Truck and Bus Operations
Detroit Diesel Allison

POWER PRODUCTS AND DEFENSE OPERATIONS

Allison Gas Turbine
Delco Systems Operations
Electromotive

Military Vehicles Operations

TECHNICAL STAFF

Design Staff
Advance Product Manufacturing Engineering
Research Laboratories
Current Engineering Manufacturing Services
Worldwide Product Planning

PUBLIC AFFAIRS

Personnel Administration and Development
Environmental Activities
Industry/Government Relations
Public Relations
Legal Staff

OPERATING STAFF

Industrial Relations
Marketing Staff
Materials Management
Consumer Relations

FINANCIAL STAFF

Chief Economist's Staff
Financial

QUALITY AND RELIABILITY

GM Warehousing and Distribution
Quality and Reliability Staff

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

No. A-846

LARRY DODSON, et. al.,

Petitioners,

-vs-

GENERAL MOTORS CORPORATION,

Respondents.

PROOF OF SERVICE

I certify that a copy of the Petitioner's "Petition for a Writ of Certiorari to the United States Court of the Appeals for the Sixth Circuit" was delivered by U.S. Mail, postage prepaid, this 20th day of July, 1991 to the following:

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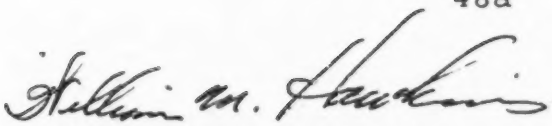

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